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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 UNITED STATES OF AMERICA,

12 Plaintiff,

CASE NO. 07cr3238WQH

13 vs.

14 JUAN HERNAN LEMUS,

Defendant.

ORDER

15 HAYES, Judge:

16 The matter before the Court is the Motion to Suppress Evidence (Doc. # 17) filed by
17 Defendant Juan Hernan Lemus.

18 **FACTS**

19 On August 24, 2006, at approximately 6:00 a.m., Detective Eric Longoria of the
20 Calexico Police Department Investigations Division arrived at work and was informed during
21 a briefing that an arrest warrant had been issued for Defendant for possession of controlled
22 substances for sale. Detective Longoria testified that he knew Defendant had past arrests and
23 incidents in Calexico, including a conviction for accessory to attempted murder from a drive-
24 by shooting. Detective Longoria testified that he had several contacts with Defendant and his
25 family members, including cousins who Detective Longoria knew were involved in violent
26 crimes such as robbery and were on probation for those crimes. Detective Longoria testified
27 that he had taken part in a probation search of Defendant's residence on May 25, 2005, and
28 was aware that it was a one bedroom apartment and that Defendant had lived alone. During

1 that probation search, police found the controlled substances which led to the arrest warrant.

2 After confirming that Defendant still lived at the apartment located at 301 Sixth Street,
3 Apartment C, Calexico, Detective Longoria and Detective J. Diaz set up surveillance by
4 parking outside the apartment. Detective Diaz also had taken part of the May 25, 2005,
5 probation search of Defendant's apartment. Approximately one hour after setting up
6 surveillance, the officers saw Defendant walk out of his apartment and over to the main
7 residence at 301 Sixth Street, where Defendant's mother lived. The area consisted of the main
8 residence, where Defendant's mother lived, and three apartments behind the main residence,
9 one of which Defendant lived in. Detective Diaz was able to confirm Defendant's identity
10 from prior law enforcement contacts. After a few minutes, Defendant left the main residence
11 and walked back to his apartment carrying a manila folder. Defendant did not appear to notice
12 the officers. The officers requested two more units for back up. Detective Longoria testified
13 that he called for backup because he was aware of Defendant's history of violent crimes, and
14 backup was necessary to apprehend Defendant with sufficient force and prevent the situation
15 from escalating.

16 The officers drove up to the apartment, exited their vehicles, and approached Defendant
17 as he was walking towards his apartment. At this point, Defendant was inside a chain link
18 fence and the officers were just outside of the fence, approximately twelve feet away from
19 Defendant. The officers called to the Defendant, and the Defendant looked back. The officers
20 ordered the Defendant to come to the front of the gate. Defendant asked what was going on,
21 and the officers informed him of the arrest warrant. The officers told the Defendant that he
22 was under arrest and that they were going to take him into custody. Defendant did not comply
23 with the order to come to the front gate and began backing up toward his apartment. The
24 officers continued to order Defendant to come to the front gate. Two backup officers, Sergeant
25 Gonzalo Gerardo and Officer Armand Orozco, arrived at the scene and Defendant asked
26 Sergeant Gerardo what was going on. Sergeant Gerardo advised the Defendant of the
27 outstanding arrest warrant. Defendant remained uncooperative and continued to back up all
28 the way to a sliding glass door which he had opened. Defendant stepped into the apartment

1 breaking the threshold of the sliding glass door. The officers immediately approached and
2 handcuffed the Defendant without drawing their weapons.

3 Detective Longoria requested that Sergeant Gerardo and Officer Orozco conduct a
4 safety sweep of the apartment in order to confirm no one else would come out of the apartment
5 or back room and attack the officers. The officers conducting the safety sweep entered the
6 living room, went back through the bedroom and bathroom, and confirmed that no one else
7 was in the apartment.

8 During the safety sweep, Detective Diaz alerted Detective Longoria to the couch located
9 in the living room. Detective Longoria looked down at the couch while he was approximately
10 three feet away and “noticed the bottom grip portion of a firearm . . . protruding out of the
11 couch.” *Transcript*, p. 13. Detective Longoria testified that he knew Defendant was a
12 convicted felon and that possession of a firearm would be a violation of law. Detective
13 Longoria lifted the seat cushion to confirm that it was a firearm. Detective Longoria had two
14 officers secure the residence while he applied for a search warrant. Upon issuance of the
15 search warrant, the firearm was seized.

16 On November 29, 2007, a federal grand jury returned a one-count indictment charging
17 the Defendant with being a Felon in Possession of a Firearm and Ammunition, in violation of
18 Title 18, United States Code, Sections 922(g)(1) and 924(a)(2). (Doc. # 1).

19 ANALYSIS

20 I. Entry into Defendant’s Residence

21 Defendant contends that the officers made no showing of “specific and articulable facts”
22 to support a “reasonable suspicion” that there were dangerous individuals within Defendant’s
23 residence that posed a risk to the officers’ safety. *Mot. to Suppress*, p. 4. Defendant contends
24 that the outstanding warrant was based on “non-violent drug related offenses,” and the officers
25 had not been confronted by other individuals before or during Defendant’s arrest. *Id.* The
26 Government contends the protective sweep pursuant to the arrest was valid because the officers
27 “reasonably believed that someone was inside [Defendant’s] residence who could destroy
28 evidence or pose a danger to the arresting officers.” *Opp.*, p. 6.

1 A “protective sweep” is a “quick and limited search of premises, incident to an arrest
2 and conducted to protect the safety of police officers and others.” *Maryland v. Buie*, 494 U.S.
3 325, 327 (1990). In order to admit evidence obtained from the protective sweep, the detectives
4 must have had a reasonable suspicion of danger based on “articulable facts which, taken
5 together with the rational inferences from those facts, would warrant a reasonably prudent
6 officer in believing that the area to be swept harbors an individual posing a danger to those on
7 the arrest scene.” *Id.*

8 In *United States v. Delgadillo-Velasquez*, 856 F.2d 1292, 1299 (9th Cir. 1988), the
9 Court of Appeals found that officers conducted an invalid sweep of an apartment after arresting
10 three men outside of the apartment. Although the officers had formed a suspicion that a drug
11 transaction was occurring, they had no independent knowledge that drugs were still in the
12 house or that any drugs were in danger of destruction. *Id.* The court concluded that the agents
13 had no reason to suspect anyone else remained in the apartment because they saw three men
14 go in the apartment and arrested all three of them. *Id.* The court found that the officer must
15 possess more than a subjective belief that danger existed and that there was no particularized
16 evidence supporting the officer’s belief that other persons were inside the apartment or
17 observing the arrest. *Delgadillo*, 856 F.2d at 1298.

18 In *United States v. Paopao*, 469 F.3d 760, 766 (9th Cir. 2006), the Court of Appeals
19 found that officers conducted a valid sweep of a gambling room after receiving a credible tip
20 that two perpetrators of gambling room robberies were in the room. After the officers arrested
21 one of the individuals outside of the room, the Court found that the officers had a reasonable
22 suspicion of danger from inside the room because the other individual was still missing. *Id.*
23 Even though the officers made the arrest outside of the room, the court found that the
24 protective sweep inside the room was justified because “an individual within a house can still
25 pose a threat to arresting officers outside of it The location of arrest, inside or outside the
26 premises, should only bear on the question of whether the officers had a justifiable concern for
27 their safety.” *Id.*

28 Detective Longoria testified that prior to the arrest, he was aware that the Defendant had

1 a history of violent crimes, including a conviction for being an accessory to a drive-by
2 shooting. Detective Longoria testified that he was aware that Defendant's cousins had also
3 been involved in violent crimes, and lived in the same area as Defendant. Detective Longoria
4 testified that he took these facts into account in his decision to call for back up. Detective
5 Longoria testified that the Defendant was uncooperative in complying with the officers'
6 demands to come to the front gate, and that Defendant took approximately ten steps towards
7 the sliding glass door, and that the Defendant was attempting to enter the apartment contrary
8 to the instructions of the officers. The Court finds Detective Longoria's testimony to be
9 credible. The Court finds that the Defendant's uncooperative behavior and movements toward
10 the open sliding glass door, taken together with Defendant's history of violent crimes, would
11 warrant a reasonable officer in believing that there may be another individual in the apartment
12 which would pose a danger to the officers. The Court concludes the protective sweep was
13 valid.

14 **II. Scope of the Search and Plain View Doctrine**

15 Defendant contends that the firearm was discovered in a search which went beyond the
16 scope of a valid protective sweep. *Mot. to Suppress*, p. 5. Defendant contends that protective
17 sweeps are limited only to areas where dangerous individuals may be hiding, and Detective
18 Longoria "had no legitimate reason to search under the couch cushions." *Id.* at 5. The
19 Government contends that the firearm was found in "plain view" once the officers were
20 lawfully inside the house conducting the protective sweep. *Opp.*, p. 6. The Government
21 contends that once the officers saw evidence of a firearm in plain view, the officers had
22 authority to seize the weapon. *Id.*

23 The scope of a protective sweep is "narrowly confined to a cursory visual inspection
24 of those places in which a person might be hiding." *Buie*, 494 U.S. at 327. Under certain
25 circumstances, police may seize evidence in "plain view" without a warrant. *Arizona v. Hicks*,
26 480 U.S. 321, 324-325 (1987) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971)).
27 Items found in plain view during a protective sweep may be seized. *Buie*, 494 U.S. at 330.
28 In order for the plain view doctrine to apply, (1) the detectives must have been lawfully

1 searching the area where the evidence was found, and (2) the incriminatory nature of the
2 evidence must have been immediately apparent. *Horton v. California*, 496 U.S. 128, 130
3 (1990); *United States v. Stafford*, 416 F.3d 1068, 1076 (9th Cir. 2005). Before seizing the
4 evidence in plain view, the searching officer must have probable cause to support the suspicion
5 of the incriminatory nature of the evidence. *Hicks*, 480 U.S. at 324-325. If seizure of the
6 evidence is justified, then officers are permitted to move the evidence for closer examination.
7 *Id.* at 326.


8 Detective Longoria testified that Detective Diaz entered the living room and alerted
9 Detective Longoria to the couch cushion. Detective Longoria testified that he was standing
10 approximately three feet away from the couch when he “noticed the bottom grip portion of a
11 firearm . . . protruding out of the couch.” *Transcript*, p. 13. Detective Longoria testified that
12 he knew Defendant was a convicted felon who was not permitted to possess a firearm.
13 Detective Longoria then lifted the seat cushion to confirm it was a firearm. Once he made that
14 confirmation, Detective Longoria secured Defendant’s apartment and applied for a search
15 warrant.

16 The Court finds that Detective Longoria was lawfully inside Defendant’s living room,
17 saw the butt of the firearm in plain view, and immediately knew the incriminating nature of
18 the gun. Although Detective Longoria could have seized the firearm once he saw it in plain
19 view, he lifted the couch cushions to confirm it was a firearm, and applied for a search warrant.
20 The Court concludes that Detective Longoria’s lifting the couch cushion did not exceed the
21 scope of the protective sweep.

22 CONCLUSION

23 IT IS HEREBY ORDERED that the Motion to suppress evidence (Doc. # 17) filed by
24 Defendant is DENIED.

25 DATED: April 18, 2008

26 
27 **WILLIAM Q. HAYES**
28 United States District Judge